Supreme Court, U.S.
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No. 07-1467

In The
Supreme Court of the United States

MARCY ALBERTONI, ET AL.,

Petitioners,

v.

BAYER CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

ALBERTONI PETITIONERS' PETITION FOR REHEARING

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PETITION FOR REHEARING

On October 6, 2008, the Court denied the Albertoni Petitioners' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *In re Phenylpropanolamine (PPA),* 2008 WL 163041 (9th Cir. 2008). This petition for rehearing is timely filed under Supreme Court Rule 44(2), which states in relevant part that "[a]ny petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial . . . " For the reasons discussed below, the Albertoni Petitioners respectfully ask the Court to grant this petition for rehearing and hear this case.

I. INTRODUCTION

This appeal arose from the district court's denial of the Albertoni Petitioners' Federal Rule of Civil Procedure 60(b) motion for relief from judgment. On May 7, 2004, the district court dismissed the Albertoni Petitioners' PPA claims for failure to comply with case management orders. On March 3, 2006, the Albertoni Petitioners filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b), relying on both Rule 60(b)(4) and Rule 60(b)(6). Rule 60(b) provides:

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

. . .

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). "A motion under Rule 60(b) must be made within a reasonable time – and for reasons

(1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." FED. R. CIV. P. 60(c)(1).

The district court denied the Albertoni Petitioners' motion on May 16, 2006. The court held that the delay before filing the motion for Rule 60(b) relief was unreasonable and denied the motion as untimely. *PPA*, 2008 WL 163041 at *1. The Ninth Circuit affirmed. *Id.* at *2.

II. THE EVIDENCE

The Albertoni Petitioners' trial counsel never received a copy of the motion to dismiss on which the dismissal of the lawsuit was based. Nor did the Albertoni Petitioners' trial counsel timely receive the order dismissing the case for failure to comply with the case management orders. While the order dismissing the lawsuit was entered on May 7, 2004, the Albertoni Petitioners' trial counsel did not receive it until well over a year later.

The Albertoni Petitioners proved these facts with affidavits and other evidence. On the other hand, the respondents proved that the documents at issue were sent – not that they were received. For example, the respondents served up the affidavit of Plaintiffs' Liaison Counsel Lance Palmer, but Mr. Palmer's affidavit shows only that he sent case management orders, other orders, and other relevant documents to Albertoni Petitioners counsel (now former counsel) Catouche Body and Delano Funches. Mr. Palmer's

affidavit stops far short of providing evidence that the Albertoni Petitioners actually received the critical documents.

The contrast in proof – in other words, the contrast in sent as opposed to actually received – is highlighted by the respondents' briefing in this Court. They continually stated that the key documents were sent: (1) "Lance Palmer . . . forwarded to Petitioners' counsel a copy of CMO 15 and 15A. . . ."; (2) "Defense counsel also mailed a copy of CMO 15 to Petitioners' counsel. . . ."; (3) "Plaintiffs' Liaison Counsel forwarded a copy of this Minute Order to Petitioners' counsel. . . ."; (4) "Plaintiffs' Liaison Counsel forwarded a copy of this order to Petitioners' counsel. . . ."; (5) "The first proposed order was e-mailed to Mr. Catouche Body . . . "; (6) "[T]he second proposed order was served on Mr. Funches at Funches & Associates. . . . "; (7) "Petitioners' attorneys were sent the district court's orders. . . ."; (8) "[A]ll CMOs were served upon Petitioners . . . "; (9) "Plaintiffs' Liaison Counsel . . . mailed to Mr. Funches . . . all of the district court's CMOs and orders . . . "; (10) "Plaintiffs' Liaison Counsel . . . mailed to Petitioners' counsel [ ] CMO 15 and 15A. . . ."; (11) "Defense counsel also mailed the letter to Mr. Funches, along with a copy of CMO 15 . . . "; (12) "[T]he certificate of service . . . demonstrated that Mr. Funches was properly served with a copy of [CMO 15]. . . ."; (13) "Plaintiffs' Liaison Counsel . . . mailed to Mr. Funches at the correct address a copy of CMO 15. . . ."; (14) "[T]he certificate of service . . . indicates that Mr. Funches was properly

served with [CMO 15] . . . "; (15) "Petitioners were mailed numerous documents, including the district court's orders . . . "; (16) "[T]he mailing of all of these documents to Mr. Funches . . . satisf[ied] due process. . . ."; (17) "Petitioners were properly mailed copies of all of the district court's CMOs . . . " Brief in Opposition at 5, 8, 12, 13, 14, 16, 17 n.4.

Yet the district court concluded that the Albertoni Petitioners' "attorney[s] were in fact *receiving* documents from the court, from defendants, and from plaintiffs' liaison counsel . . . " *PPA*, 2008 WL 163041 at *1 (emphasis added). For that reason, the district court held that the Albertoni Petitioners' two-year delay before filing a motion for relief was unreasonable and denied the motion as untimely. *Id.*

In large part, the district court made its dispositive determination that the Albertoni Petitioners' "attorney[s] were in fact receiving documents" from applying the wrong standard of review. And in large part, the Ninth Circuit affirmed by making the same error. The Albertoni Petitioners explain below.

III. THE STANDARD OF REVIEW

The standard of review regarding a Rule 60(b) motion is abuse of discretion. *In re Roxford Foods, Inc.*, 12 F.3d 875, 879 (9th Cir. 1993); *In re Hammer*, 940 F.2d 524, 525 (9th Cir. 1991). While the courts have discretion, their discretion is limited by three policy considerations. *Roxford Foods*, 12 F.3d at 879;

Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th Cir. 1974).

First, because of Rule 60(b)'s remedial nature, it must be liberally applied. *Roxford Foods*, 12 F.3d at 879; *Schwab*, 508 F.2d at 355. Second, because default judgments are disfavored, cases should be decided on their merits if possible. *Roxford Foods*, 12 F.3d at 879; *Schwab*, 508 F.2d at 355. And third, as long as relief is sought in a timely fashion, any doubt should be resolved in favor of setting aside the default judgment. *Roxford Foods*, 12 F.3d at 879; *Schwab*, 508 F.2d at 355.[1]

Roxford Foods is a good example of how the standard of review should work. In that case, the Rule 60(b) movant contended that, because he was never given notice of the hearing on the opposing party's motion for summary judgment, the resulting declaratory judgment should be vacated. 12 F.3d at 879. The Ninth Circuit readily agreed: "Because no such notice was given, we reverse the district court's contrary holding, and vacate the bankruptcy court's declaratory judgment in so far as it applies to the" movant. *Id.* at 881.

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[1] Obviously, there was no "default judgment" in this case insofar as that term describes a judgment rendered against a party who did not answer the suit or appear for trial. *Roxford Foods* and other cases use the term "default judgment" to refer to a non-merits judgment rendered after a party does not respond to a dispositive motion. *See Roxford Foods*, 12 F.3d at 879.

Numerous district court opinions show that a court, when adjudicating a Rule 60(b) issue, is to "resolv[e] all doubts in favor of the party seeking relief." *See, e.g., Satterlee v. Allen Press, Inc.*, 455 F. Supp.2d 1236, 1242 (D. Kan. 2006), *aff'd*, 274 Fed. Appx. 642 (10th Cir. 2008); *MacArthur v. San Juan County*, 405 F. Supp.2d 1302, 1306 (D. Utah 2005); *Fernandes v. United States*, 169 F.R.D. 372, 374 (D. Kan. 1996). Correspondingly, when a court determines a Rule 60(b) issue, it should not ignore uncontradicted evidence. *See Hunter v. Brooks*, 127 F.R.D. 115, 116 (D. Md. 1989); *Update Art, Inc. v. Maariv Israel Newspaper, Inc.*, 635 F. Supp. 228, 230 (S.D.N.Y. 1986); *Swift Chem. Co. v. Usamex Fertilizers, Inc.*, 490 F. Supp. 1343, 1350 (E.D. La. 1980); *Rainwater v. Mallas*, 42 F.3d 1386, *3 (4th Cir. 1994). In a number of opinions, circuit courts have approved and utilized these principles. *See, e.g., United States v. Baus*, 834 F.2d 1114, 1121 (1st Cir. 1987) ("The standard of review for denial of a Rule 60(b)(6) motion is simply stated. 'For the purpose of this opinion, we take the facts to be as the [guarantors] allege, for all we are to do on this appeal is determine whether those allegations, if proved, would justify relief.'") (quoting *United States v. Cirami*, 563 F.2d 26, 28 (2d Cir. 1977)).

Resolving all doubts in favor of the Rule 60(b) movant and crediting the movant's uncontradicted evidence is consistent with the purpose of the rule. "The purpose of Rule 60(b) is to delineate the circumstances under which relief may be obtained from the

operation of final judgments, whether they are entered by default [ ] or otherwise." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981) (citation omitted). And "[t]he purpose of incorporating a residual clause, such as 60(b)(6), in a rule is to provide for unusual and exceptional circumstances that the drafters of the rule did not anticipate." Deborah Roy, *The Sixth Circuit's Unprecedented Reopening of Demjanjuk v. Petrovsky*, 42 Clev. St. L. Rev. 737, 749-50 (1994).

"By its very nature, [Rule 60(b)] seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.'" *Seven Elves*, 635 F.2d at 401 (quoting *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970)). Thus, "[i]t is often said that the rule should be liberally construed in order to do substantial justice." *Seven Elves*, 635 F.2d at 401 (citing *Greater Baton Rouge Golf Ass'n v. Recreation & Park Comm'n*, 507 F.2d 227, 228-29 (5th Cir. 1975); *Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 823 (5th Cir. 1965); *In re Casco Chem. Co.*, 335 F.2d 645, 651 n.18 (5th Cir. 1964); *Serio v. Badger Mut. Ins. Co.*, 266 F.2d 418, 421 (5th Cir.), *cert. denied*, 361 U.S. 832 (1959)). "What is meant by this general statement is that, although the desideratum of finality is an important goal, *the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in*

order that the judgment might reflect the true merits of the cause." *Seven Elves*, 635 F.2d at 401 (emphasis added) (citing *Brothers, Inc. v. W. E. Grace Mfg. Co.*, 320 F.2d 594, 610 (5th Cir. 1963); *Serio*, 266 F.2d at 421).

IV. THE COURTS' ERRORS

The district court's decision, and the Ninth Circuit's affirmance, violate the above principles. The district court, rather than crediting the uncontradicted evidence of no receipt, concluded that the Albertoni Petitioners' "attorney[s] were in fact receiving documents from the court, from defendants, and from plaintiffs' liaison counsel . . . " *PPA*, 2008 WL 163041 at *1. All doubts were not "resolv[ed] . . . in favor of the party seeking relief," and both courts thereby erred. Had they followed the correct standard of review, they would have concluded that the Albertoni Petitioners' Rule 60(b) motion was made within a reasonable time and was therefore timely. Had they followed the correct standard of review, they also would have necessarily found that the Albertoni Petitioners proved their ground of no receipt and were entitled to Rule 60(b) relief.[2]

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[2] The Ninth Circuit wrote that, "Even if [the Albertoni Petitioners'] counsel did not have notice, the district court found that counsel did not fulfill their obligation to ensure that the court had the correct counsel listing and address and, given the lack of activity in the case, unreasonably failed to monitor the electronic docket. . . . There is nothing to indicate that the

(Continued on following page)

V. THE COURT SHOULD GRANT REVIEW.

Rule 60(b)(6) is the "catchall provision." *Davis v. Kansas Dep't of Corrections*, 507 F.3d 1246, 1249 (10th Cir. 2007); *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005), *cert. denied*, 546 U.S. 1090 (2006). It has been described as "a grand reservoir of equitable power to do justice in a particular case[.]" 7 J. Lucas & J. Moore, Moore's Federal Practice ¶ 60.27[2] (2d ed. 1982).

"The most common 'other reason' for which courts have granted relief" under Rule 60(b)(6) "is when the losing party fails to receive notice of the entry of judgment in time to file an appeal." 11 Charles Alan Wright et al., Federal Practice & Procedure § 2864 (2d ed. 1995). That is precisely what happened here. But under the Ninth Circuit's approach, justice moves from the "grand reservoir" in a trickle. Under that standard, courts have the power to ignore uncontradicted evidence that favors the Rule 60(b)(6)

[Albertoni Petitioners] or any of their representatives made reasonable efforts to remain apprised of the status of the case." *PPA*, 2008 WL 163041 at *1-2. Even if these conclusions were correct, they put the burden on the Albertoni Petitioners, where it does not belong. "Notice by mail or other means *as certain to ensure actual notice* is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (emphasis added). It is undisputed that the correct name and address of the Albertoni Petitioners' trial counsel were reasonably ascertainable.

movant and resolve all doubts *against* the movant, not for it – even where there really *is no* doubt.

The Albertoni Petitioners ask the Court not to let this erroneous method of determining Rule 60(b) issues stand. They respectfully request that the Court grant their petition for rehearing and hear this case.

Respectfully submitted,

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GOOD FAITH CERTIFICATION OF COUNSEL

Pursuant to United States Supreme Court Rule 44(2), I hereby certify that (1) this Petition for Rehearing is presented in good faith and not for delay, and (2) this Petition for Rehearing is restricted to the grounds specified in Rule 44(2). Specifically, this Petition for Rehearing is restricted to "other substantial grounds not previously presented."

Signed this 30th day of October, 2008.

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